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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-140

AGRASHELL, INC. *Petitioner*

v.

HAMMONS PRODUCTS COMPANY, *Respondent*

BRIEF IN OPPOSITION

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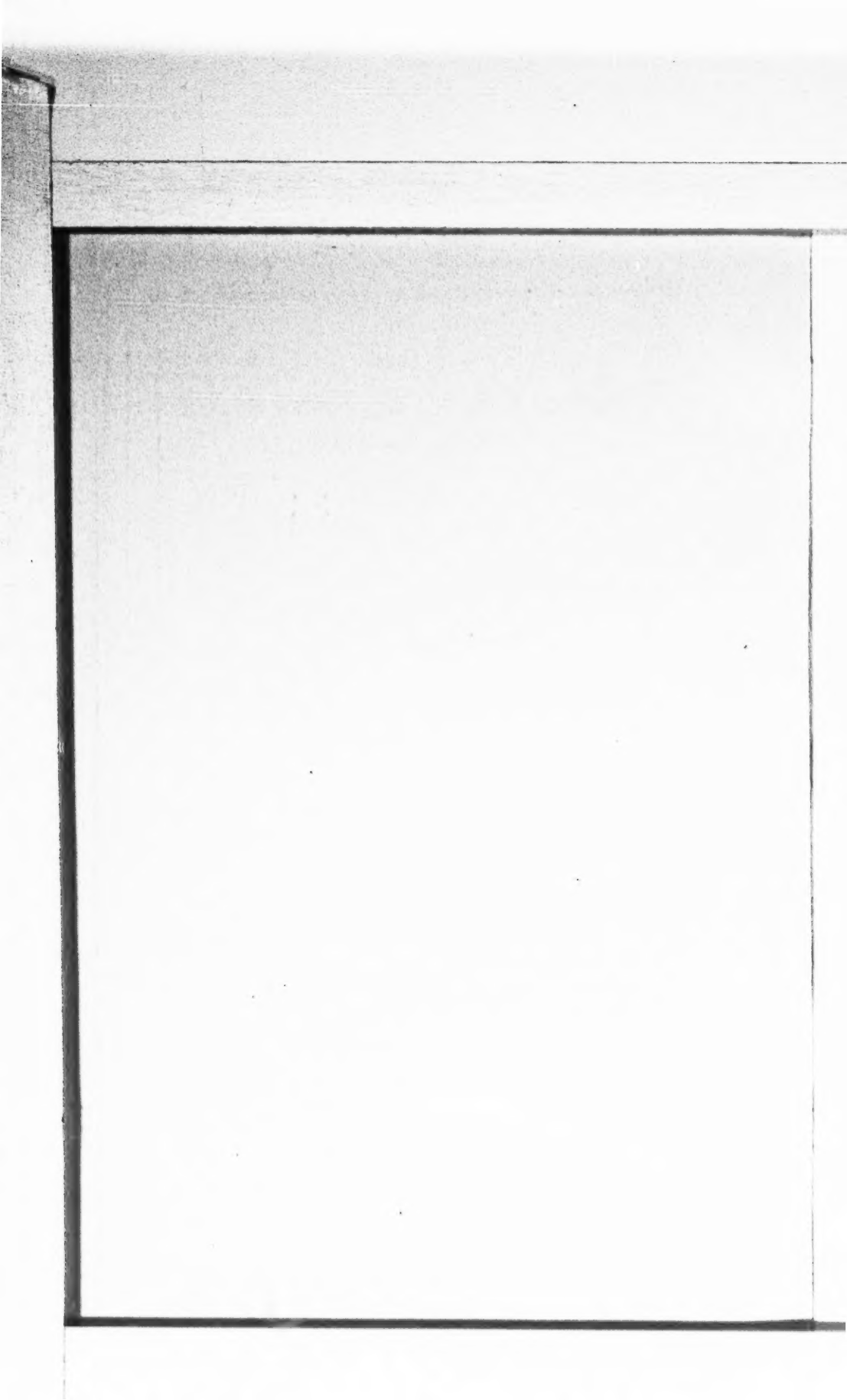

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BRIEF IN OPPOSITION

INTRODUCTION

This Brief in Opposition is filed in accordance with the Clerk's letter of September 17, 1973, informing counsel of the Court's request that Hammons respond to the Petition filed by Agrashell herein on July 18, 1973. We had previously notified the Court, by letter of July 31, 1973, that Hammons wished to waive its right to file a Brief in Opposition, feeling that Agrashell's Petition raised questions which are clearly not worthy of the Court's attention. For the reasons developed below, we remain convinced that the Petition lacks merit.

Indeed, we do not believe either of the "questions presented" in the Petition is genuinely raised by the facts of record in this case. Any attempt to restate the questions in terms we consider justified by the factual record would necessarily produce questions quite different from those Agrashell intended to bring here. Therefore, we have foregone any statement here of "Questions Presented."

To avoid repetition, we have also dispensed with a separate "Statement of the Case" since every exception we take to the Petition's recitation of the facts must logically be dealt with below in our reasons for opposing issuance of the writ.

REASONS FOR DENYING THE WRIT

I. As to Question 1, Fact of Damage

A. The question submitted misstates the facts and is not presented by the record.

Neither the record nor any statement, finding, or ruling by the courts below supports the assertion in question No. 1 that the testimony of Hammons' damage expert is "the only evidence that claimant had been injured" (Petition, p. 2). Indeed, the Petition itself recognizes the presence in the record of the evidence that formed the basis for the damage expert's opinions and conclusions — contractual commitments by key distributors not to buy from Hammons.

At page 9, the Petition recites the proven facts that, whereas Hammons was foreclosed from making any sales in the portion of the market covered by Agrashell's exclusive-dealing arrangements, its sales in another market where those exclusive-dealing ar-

rangements were not operative exceeded Agrashell's sales in a ratio of 60 to 40.

In stating the first question, moreover, the Petition draws its hyperbolic terminology — "an economist's damage *theory*," "many practical defects," and "'serious failings' of proof" — from statements in the court of appeals' opinion relating to testimony on the amount, not the fact of damages.[1] Agrashell has written a question designed to exploit unrelated reservations of the court of appeals. Unless Agrashell is asking this Court to reexamine the evidence and to decide the factual question as to the sufficiency of the evidence, the only issue here is one easily answered: whether an appellate court's doubts or the jury's verdict is to prevail once the court has ascertained that there was an evidentiary basis for finding the fact of injury.

Far from being the *only* evidence of "fact of damage," the testimony of Hammons' damage expert was put in evidence, first, to give the jury guidance as to the conclusions and inferences to be drawn from the primary evidence of the fact of Hammons' injury

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[1] The court of appeals' reference to the damage expert's testimony as a mere "theory" with "many practical defects" appears at page 21 of the opinion (Petition, Appendix A), where the court is discussing the expert's explanation of his calculation of the amount of business Hammons lost in the foreclosed market and the extent of its loss on each ton of material it had to divert to a less lucrative market. Mention of the "serious failings" of the expert's testimony is made at page 24 as a summation of the foregoing discussion of "defects" in the expert's methods of estimating the profits lost and as a prelude to the court's conclusion that "some damage" had been proven within the meaning of Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9 (1969).

and, second, to establish the amount of the damage suffered.

The two exclusive-dealing contracts found by the court of appeals to be in unreasonable restraint of trade were maintained between Agrashell and the two most advantageously situated distributors in the market. These two distributors were the leading manufacturers and sellers of the blasting equipment in which the nutshell abrasive sold by Agrashell and Hammons is used (III App. 752T). As such, they were relied upon by the equipment customers for supplies of the abrasives best adapted for use in the blasting equipment (II App. 234T-235T; III App. 733T-734T; III App. 855T-856T; V App. 14-19, 41-47). When the leading producer of a product secures exclusive-dealing arrangements with buyers having preferred marketing positions, the depressing effect of those agreements upon the business of competing producers is obvious. Even Agrashell's expert witness agreed that such arrangements significantly strengthen one's marketing position (III App. 924T-925T).

As long as these exclusive-dealing arrangements were observed, they necessarily denied Hammons access to these two preferred marketing outlets. Hammons' initial advertising campaign when it entered the abrasives market (II App. 229T-233T; IV App. 16-20) and its subsequent sales efforts directed to the entire trade, including Pangborn and Wheelabrator, the two distributors tied to Agrashell through exclusive-dealing contracts, are well documented (II App. 56T-57T; II App. 229T-235T; V App. 105-108). At all relevant times, Hammons had ample soft grit abrasive material to supply the market with an additional one thousand to fifteen hundred tons annually (II App.

238T-239T)—more than enough to fill the orders its expert projected in his damage calculations.

The record evidence of fact of damage in this case is like that of other private antitrust cases in which the plaintiff sought recompense for expected sales lost by reason of the defendant's predatory or exclusionary business practices. *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959). For fact of damage, rather than amount of damage, Hammons relied primarily, not on the expert's testimony, but on "circumstantial evidence" from which the trier of fact could "infer . . . that the necessary causal relation between . . . [Agrashell's] conduct and the claimed damage existed." *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 125.

B. No confusion or conflict exists in the applicable law.

It is a late date indeed to be raising here questions relating to the standard of proof in private antitrust cases for establishing that reasonably anticipated profits were lost and that the loss resulted from an antitrust violation. The applicable criteria were stated and restated in at least four decisions of this Court preceding *Zenith, supra. Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 691, 699 (1962); *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 264 (1946); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Story Parchment Co.* v. *Paterson Paper Co.*, 282 U.S. 555 (1931).

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage

> plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 123-4, quoting *Bigelow* v. *RKO Pictures, Inc., supra.*

In the courts of appeals, these criteria have been cited and applied uniformly. *Richfield Oil Corp.* v. *Karseal Corp., supra; Atlas Building Products Co.* v. *Diamond Block & Gravel Co., supra; Flintkote Co.* v. *Lysfjord,* 246 F.2d 368 (9th Cir. 1957); *Kobe, Inc.* v. *Dempsey Pump Co.,* 198 F.2d 416 (10th Cir. 1952). The results have varied because the facts have varied, not because the courts are divided or confused as to the applicable principle of law. In *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.,* 297 F.2d 906 (2nd Cir. 1962), upon which Agrashell relies (Petition, p. 16), there was no departure from the above line of cases. That case involved the standard for proving amount of damage, not the occurrence of an injury or its causal connection with the antitrust violation.

Nor is it essential, as the Petition here seems to suggest (*e.g.,* p. 14), that the antitrust violation be the only possible explanation in the record for plaintiff's loss of anticipated profits. "Normally it would be

enough . . . if the defendant 'materially contributed' to plaintiff's injury." *Perma-Life Mufflers, Inc.* v. *Intern. Parts Co.*, 392 U.S. 134, 143 (1968), citing *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*. See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, *supra*, 395 U.S. at 114, n. 9.

"Having shown the illegal restraint applied to its product, [Hammons] had proved the causal connection between the defendant's wrongful act and the loss of revenue." *Richfield Oil Corp.* v. *Karseal Corp.*, *supra*, 271 F.2d at 713.

C. There are ample additional grounds for sustaining the lost-profits damage award.

Many of the shortcomings Agrashell assigns to Hammons' proof of injury are attributable directly to the unlicensed surgery the court of appeals performed on the Section 1 Sherman Act case Hammons had presented to the jury. The court below (1) usurped the function of the jury when it weighed the conflicting evidence (Opinion, p. 17) and decided Hammons had failed to prove exclusive-dealing and resale price maintenance arrangements between Agrashell and "agents" other than Pangborn and Wheelabrator,[2] (2) ignored or overlooked portions of the record when it stated (Opinion, p. 24) that Agrashell did not use its patent as an illegal barrier to competition prior to

[2] "The Seventh Amendment provides that 'no fact tried by a jury, shall otherwise be re-examined in any Court of the United States,' U.S. Const. amend. VII. As I see it the verdict of this jury should not have been 're-examined' and overturned nor the judgment set aside." Mr. Justice Clark, dissenting, in Mayer Paving & Asphalt Co. v. General Dynamics Corp., — F. 2d —, 1973 Trade Cases ¶ 74,719 (7th Cir. 1973).

the patent's expiration and (3) erred as a matter of law when it decided (Opinion, p. 24) that Hammons' failure to establish an attempt to monopolize "negated" Agrashell's misuse of its patent as an illegal barrier to sales by Hammons.

1. In its weighing of the evidence on the existence of a Section 1 Sherman Act combination between Agrashell and its "agents" other than Pangborn and Wheelabrator, the court of appeals' opinion in and of itself discloses the error committed. The court points first to evidence "that Agrashell dealt with the agents whether or not they agreed to the statement of policy" (Opinion, p. 17). Since it was this statement of policy that embodied Agrashell's exclusive-dealing and resale price maintenance terms of sale (V App. 10-13), the court's statement recognizes the undeniable evidence in the record that *at least* some of the other agents were induced to enter into unlawful agreements (II App. 366T; III App. 683T-684T, 972T-973T; V App. 22-23, 26, 32, 33, 37, 49, 67, 70, 79, 82, 83, 84, 93). Apparently the court of appeals made the preposterous assumption that Hammons had the burden or obligation of proving that agreement had been reached with every "agent" before it could be found that agreements had been reached with any of them and before such agreements could be held violative of the Sherman Act.

If the court of appeals had been the trier of fact in this case, it might have been justified in concluding, on the basis of the testimony it described (Opinion, p. 17), that two of the agents had never heard of the statement of policy. But the jury was entitled to believe Agrashell's own statements to the trade that "all of them follow the distribution policy that we have

established" (V App. 22, 33, 40, 80). There is, in any event, no basis in the law for the court of appeals' insistence upon proof of "either formal or informal contractual relationships" (Opinion, p. 17). A contract is only one means of creating a conspiracy or combination in restraint of trade. Much less formal arrangements have frequently been held to have done so. *United States* v. *Container Corp. of America,* 393 U.S. 333 (1969); *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 142 (1948); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809 (1946); *Interstate Circuit* v. *United States,* 306 U.S. 208, 227 (1939). It is enough that Agrashell encouraged — and sometimes demanded — observance of the statement of policy and many "agents" were persuaded to comply with it. *Albrecht* v. *Herald Company,* 390 U.S. 145, 150 (1968); *United States* v. *Parke, Davis and Company,* 362 U.S. 29, 43 (1960).

2. With respect to the status of Agrashell's patent, the court of appeals declared: "The assumption that the patent was an illegal barrier prior to its expiration was conclusively negated when the trial judge ruled that the patent had not been fraudulently procured" (Opinion, p. 24). By thus eliminating the patent as one of the "structural supports" for the expert's damage testimony, the court ignored a basic portion of Hammons' case — that the patent was used to monopolize a product market broader than the scope of the patent grant. The Perry patent covered "pelletized nutshells . . . with the hardness of black walnut shells" "for use in air blasts for cleaning metal" (IV App. 3); the exclusive-dealing commitments secured through the leverage of the patent covered all "soft grit blasting and cleaning materials"

(V App. 11, 14-15, 41-42), without regard to end use or cleaning method.[3]

3. As for the failure of Hammons' attempt-to-monopolize count, the only element the court of appeals found lacking is proof of dangerous probability of success.[4] That finding does not negate the proof of the overt activities whose "dangerous probability" had to be assessed. Nor did it bar Hammons from relying on those overt activities as some of the operating market forces that made the illegal exclusive-dealing arrangements more effective and hence more damaging to Hammons. Even entirely lawful conduct can sometimes be shown to be part of a scheme or course of conduct violative of Section 1 of the Sherman Act. *Maryland & Va. Milk Pro. Ass'n.* v. *United States,* 362 U.S. 458, 472 (1960); *United States* v. *United States Gypsum Co.,* 340 U.S. 76, 87 (1950). Surely conduct that, if successful or likely to be successful in achieving its purpose, would violate Section 2 of the Sherman Act can be treated as part of the market context in which the existence and extent of injury to a competitor is to be determined.

Hammons should have been given "the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra,* 370 U.S. at 699. Hammons' antitrust claim is based on Agrashell's

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[3] Hammons' contention that Agrashell had extended the patent monopoly "to nutshell products not covered by the patent" was specifically called to the jury's attention by the trial court (III App. 986T).

[4] This portion of the decision below has been challenged in Hammons Products Co. v. Agrashell, Inc., No. 73-25.

single, cohesive, and protracted course of anticompetitive conduct. (See Hammons' opening statement, II App. 27T-28T, and closing argument, III App. 1007T-1011T.) Hammons' claim for lost profits is not predicated on any theory that exclusive-dealing contracts are unlawful *per se* but that they represent an unreasonable restraint of trade when considered along with Agrashell's regulation of price, filing and threats of patent-infringement suits to obtain exclusive-dealing contracts going beyond the scope of its patent, and contractual reservation to itself of all business with the government and with the dental-supply industry.

II. As to Question 2, The "Commission Sales" Contract

A. This question is not presented by the record.

The court below contented itself with an elliptical one-paragraph exposition of its reasons for denying the Agrashell-Wheelabrator contract the protection of "the doctrine promulgated in *United States* v. *General Electric Co.*," 272 U.S. 476 (1926) (Opinion, p. 17.) *GE* permits a manufacturer to use agency arrangements to control the price charged for his product at wholesale and retail. Seizing upon the brevity of the court of appeals' treatment of the matter, Agrashell understates the nature and terms of the agreement held to have "extended the life of the patent beyond the expiration date" (Opinion, p. 18). It presents here for review, and defends, only the price-fixing terms of the contract.

But Agrashell's agreement with Wheelabrator is not an agency contract "merely for the distribution of a product warehoused and priced by the manufacturer" (Petition, p. 3). It is a contract that (1)

leaves the "agent," Wheelabrator, "free temporarily" to deal elsewhere only when "Agrashell is unable to fulfill orders" (V App. 15), (2) denies Wheelabrator authority to compete with Agrashell in selling to "the rubber industry, the dental supply industry and the ornamental jewelry industry" (V App. 15), (3) forbids Agrashell to make bids or sales at prices below those dictated to Wheelabrator (V App. 17), and (4) was supplemented by an understanding that Wheelabrator would not compete with Agrashell for government contracts (V App. 78, 81).

Consequently, what we have here is not simply the unilateral establishment by a manufacturer of the price at which he will make, through an agent, the first sale of his patented product. Rather, we have an "aggregation of trade restraints" (*United States* v. *Sealy, Inc.*, 388 U.S. 350, 354 (1967)) that takes this case completely outside the scope of the *General Electric* doctrine, *supra*. Nothing in the *General Electric* opinion suggests that a contract of agency can never contain or constitute a Section 1 Sherman Act violation. When the patent-holding manufacturer and his "agent" are competing or potentially competing independent businessmen, they are not free to eliminate competition between themselves by agreement. *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942). *A fortiori,* they are not free to make exclusive-dealing and other contractual commitments that protect the patent owner from competition after the expiration of his patent.

Any possibility that the court of appeals was relying exclusively on the pricing provisions of the agreement between Agrashell and Wheelabrator is negated by the court's holding with respect to the

Pangborn contract. The latter contract specifies that "Agrashell reserves *no* right to set selling prices" (V App. 45). Yet the court below, stressing the exclusive-dealing feature of that agreement, found the same illegal extension of the patent monopoly (Opinion, pp. 18-19).

Indeed, the court of appeals did not even decide that the Wheelabrator contract is in fact a contract of agency. Its differentiation of the *General Electric* doctrine is prefaced with the phrase: "Assuming that the Wheelabrator contract was a contract of agency, *see* RESTATEMENT (2d) OF AGENCY §14J (1958)" (Opinion, p. 18). This reference to the section of the Restatement that deals with the distinction between an agent and a buyer is a clear manifestation that the lower court stopped short of accepting Agrashell's contention that it had made an agency contract. Since §14J of the Restatement makes agency status depend "upon whether the parties agree that his duty is to act primarily for the benefit of the one delivering the goods to him or is act primarily for his own benefit," there are serious obstacles to classifying Wheelabrator as an agent. It is difficult, first of all, to understand why Wheelabrator needs price-support assurances from Agrashell if Wheelabrator is acting primarily not for its own benefit but for Agrashell's. Moreover, the agreement recognizes Wheelabrator as being a producer and marketer of various types of cleaning equipment and the materials used therein (V App. 14) and specifies that Wheelabrator is to make sales under the contract in its own name, not in Agrashell's name (V App. 15). Each of these features of the arrangement is inconsistent with agency status. *See* RESTATEMENT